KAMALA D. HARRIS
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State of California
DEPARTMENT OF JUSTICE

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June 5, 2013

Thanne Cox
Attorney Advisor
US Environmental Protection Agency Region 9
Mail Code ORC-3
75 Hawthorne Street
San Francisco, California 94105-3901

RE: Yosemite Slough Site – Removal of the California State Lands Commission as a PRP

Dear Ms. Cox:

We received the EPA's General Notice Letter of April 5, 2013, stating that our client, the California State Lands Commission (the "Commission"), may be a Potentially Responsible Party ("PRP") for hazardous substances at the Yosemite Creek Superfund Site (the "Site"). According to the letter, the EPA believes the Commission "may be a PRP at the Site as a owner of part of the Site property."

By this letter, the Commission respectfully requests the EPA to remove the Commission from the list of PRPs for the Site. As explained in detail below, neither the Commission nor the people of the State of California, on whose behalf the Commission acts, have ever owned any property within the boundary of the Site for purposes of CERCLA liability. To be an "owner" under CERCLA, an entity must be an owner as defined by the common law. The State's ownership interest in the property (managed and controlled by the Commission pursuant to California Public Resources Code section 6301) is limited to its sovereign property interest, which is vastly different than common law ownership of property. For instance, sovereign land is subject to the constraints of the public trust doctrine, which includes limits on the ability to exclude others, limits on allowable uses, and limits on the ability to sell or otherwise dispose of property. Because the Commission is not and has never been an owner of any property within the Site under the common law, it is not an "owner" under CERCLA. Thus, the EPA should not consider the Commission to be a PRP for the Site, and we ask that the EPA remove the Commission from the PRP list.

I. "Ownership" Under CERCLA Means Common Law Ownership.

CERCLA defines the term "owner" as "any person owning" a facility. 42 U.S.C. § 9601(20)(A). In *Long Beach Unified School District v. Dorothy B. Godwin California Living Trust*, 32 F.3d 1364 (9th Cir. 1994), the Ninth Circuit found that the circularity in this definition

"implies . . . that the statutory terms have their ordinary meanings rather than unusual or technical meanings.... In other words, we read the statute as incorporating the common law definition of its terms." *Id.* at 1368 (quotations and citations omitted). The court subsequently declared that "we deem a defendant's status as an owner under common law as necessary to being an owner under CERCLA." *Id.* at 1369 n.5.

Applying this rule, the Ninth Circuit looked to the common law, including the common law of the State of California where the land was located, and found that the defendants, who held easements to run pipelines across real property, were not owners under the common law. *Long Beach Unified Sch. Dist.*, 32 F.3d 1364, 1368. Thus, the court held that the defendants were not "owners" under CERCLA. *Id.* at 1368-69. *See Burlington N. & Santa Fe Ry. Co. v. United States,* 556 U.S. 599, 613 (2009) ("Congress intended the scope of CERCLA liability to be determined from traditional and evolving principles of common law.") (quotations and citation omitted).

The Ninth Circuit recently re-affirmed *Long Beach Unified School District* in *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440 (9th Cir. 2011). The court found that "*Long Beach* establishes the rule that this court should look to the common law—including the law of the state where the land at issue is located—in determining whether a party was an 'owner' for purposes of CERCLA liability." *Id.* at 448. Following this rule, the court in *City of Los Angeles* held that a holder of a revocable permit was not an "owner" under CERCLA. *Id.* at 452.

The question, therefore, is whether the nature of the Commission's title to property within the Site satisfies the essential elements of common law ownership so as to make the Commission an "owner" under CERCLA. The answer is no.

II. The Commission's Ownership Interest at the Site Is Limited to State Sovereign Land Burdened By the Public Trust.

We will consider the area of the Site to be the area depicted in Enclosure 1 of the EPA's General Notice Letter of April 5, 2013 to Jennifer Lucchesi, the Commission's Executive Officer. This enclosure is also attached as Exhibit A in the accompanying declaration of Steven Lehman. Mr. Lehman is a surveyor employed by the Commission, and he is an expert in determining the boundaries and nature of the Commission's property.

Within the boundary of the Site, the Commission currently holds and historically has only ever held title to land which the State of California assumed from the federal government when it became a state in 1850. [Lehman Decl. ¶¶ 5-6.] *See City of Long Beach v. Mansell*, 3 Cal.3d 462, 482 (1970); *Zack's, Inc. v. City of Sausalito*, 165 Cal.App.4th 1163, 1174 (2008). Such land consists of submerged land and tidelands, and submerged land and tidelands that have been filled or reclaimed in the time since the State's admission to the Union. Tidelands are those lands lying between the lines of mean high tide and mean low tide, and submerged lands are those lands lying waterward of the line of mean low tide. *City of Long Beach v. Mansell*, 3 Cal.3d 462, 478 n. 13 (1970). The Commission holds title to these lands and has jurisdiction over them pursuant to California Public Resources Code section 6301. Other than holding title

to these lands, the Commission does not and has never had any other property interest within the boundary of the Site. [Lehman Decl. ¶¶ 5-6.]

The Commission's interest in the land is an attribute of state sovereignty. *See Idaho v. Couer D'Alene Tribe of Idaho*, 521 U.S. 261 (1997) ("[L]ands underlying navigable waters have historically been considered 'sovereign lands.' State ownership of them has been 'considered an essential attribute of sovereignty.' "); *Shively v. Bowlby*, 152 U.S. 1, 46 (1894) ("[T]itle to the shore and lands under water is regarded as incidental to the sovereignty of the state."); *Oakland v. Oakland Water Front Co.*, 118 Cal. 160 (1897) ("[T]he several states hold and own lands covered by navigable waters within their respective boundaries in their sovereign capacity."). Thus, all the land the Commission holds and has held title to within the Site is state sovereign land.

The Commission, moreover, holds the property in trust for the public. *See State of California v. Superior Court (Lyon)* 29 Cal.3d 210, 234 (1981) ("Tidelands and submerged lands owned by the state are held in trust for public purposes of navigation, commerce and fisheries."); *Colberg, Inc. v. State of Cal. ex rel. Dept. of Public Works*, 67 Cal.2d 408, 416 (1967) (finding the State "holds all of its navigable waterways and the lands beneath them as trustee of a public trust for the benefit of the people."); *People v. Cal. Fish Co.*, 166 Cal. 576, 584 (1913) (finding that submerged lands beneath navigable waters are "held by the state in trust for the benefit of the people.").

Since California's admission to the Union in 1850, the portion of land within the Site to which the Commission currently holds title has never lost its sovereign status and has always been subject to the public trust. [Lehman Decl. ¶¶ 5-6.]

III. The Commission's Title to State Sovereign Land Lacks Essential Elements of Common Law Ownership and Therefore Does Not Constitute Ownership Under the Common Law and CERCLA.

Owning real property is often described as possessing a "bundle of rights," and courts have identified several essential "sticks" in the bundle, such as the rights to use, exclude, and sell. *See Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (finding right to exclude is an essential stick); *United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945) (describing property as "the group of things in the citizen's relation to the physical thing, as the right to possess, use and dispose of it.").

As set forth below, the Commission's title to the state sovereign land in the Site lacks essential elements of common law ownership. The Commission, therefore, is not an "owner" under the common law and CERCLA. *See Long Beach Unified Sch. Dist.*, 32 F.3d 1364, 1368; *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 442.

First, the Commission merely holds the property in trust for the public for limited public purposes, and the use of the property is restricted to these purposes. According to the California Supreme Court, "[t]he state's 'ownership' of public tidelands and submerged lands

. . . which it assumed upon admission to the Union, is not of a proprietary nature. Rather, the state holds such lands in trust for public purposes, which have traditionally been delineated in terms of navigation, commerce, and fisheries." *City of Long Beach v. Mansell*, 3 Cal.3d 462, 482 (1970) (note that the California Supreme Court used quotation marks around the word "ownership"); *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 521 (1980) (declaring the State holds tidelands and submerged lands "not in its proprietary capacity but as trustee for the public."); *Nat'l Audubon Soc'y v. Superior Court*, 33 Cal.3d 419, 440-441 (finding trust property is restricted to water-oriented uses and cannot be used for general public purposes). Such title is "different in character from that which the state holds in lands intended for sale." *Ill. Cent. R. Co. v. Ill.*, 146 U.S. 387, 452 (1892) (holding the State of Illinois did not have the power to grant irrevocable title in submerged lands to a private party).

Second, the Commission does not possess the right to exclude others. The right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (finding a taking of property under the Fifth Amendment where the right to exclude others was abridged). *See United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975) ("Implicit in the concept of ownership of property is the right to exclude others."); *In re Etter*, 756 F.2d 852, 859 (Fed. Cir. 1985) (declaring the right to exclude others is "the essence of all property."). Indeed, California law defines "ownership" in terms of exclusive possession: "The ownership of a thing is the right of one or more persons to possess and use it *to the exclusion of others*. In this Code, the thing of which there may be ownership is called property." Cal. Civ. Code § 654 (emphasis added).

Here, the Commission is prohibited by federal law and the California Constitution from excluding the public from the navigable waters it holds title to within the Site. In the federal statute which admitted California as a State, the federal government required public access to California's navigable waters as a condition to California's admission to the Union: "[T]he State of California is admitted into the Union upon the express condition that . . . all the navigable waters within said State shall be common highways, and forever free, as well to inhabitants of said State as to the citizens of the United States . . . ." 9 Stat. 452, 453 § 3 (1850). In addition, Article I, Section 25 of the California Constitution provides for a public right of fishing in the navigable waters of the State:

> "The people shall have the right to fish upon and from the public lands of the State and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon . . . ."

Cal. Const. art. I, § 25. *See also* Cal. Const. art. X, § 4 ("No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water of this State, shall be permitted to . . . obstruct the free navigation of such water . . ."); Cal. Gov't Code § 39933 ("All navigable waters situated within or adjacent to [a] city shall remain open to the free and unobstructed navigation of the public.").

The courts have also enforced public rights of access to navigable waters based upon the California Constitution and the nature of the public trust. *See People ex rel. Younger v. County of El Dorado*, 96 Cal.App.2d 403, 407 (1979) (invalidating county ordinance prohibiting boating on the American River); *Hitchings v. Del Rio Woods Recreation & Park Dist.*, 55 Cal.App.3d 560, 563 (1976) (holding that plaintiffs had the right of free navigation on the Russian River).

Because the Commission has never been able to exclude the public from any of the property it has held title to within the Site, the Commission lacks the most essential element of common law ownership. Without that right, it has never been an owner under the common law and, therefore, never been an owner under CERCLA. *See Long Beach Unified Sch. Dist.*, 32 F.3d 1364, 1368 (9th Cir. 1994) (reasoning that defendants were not "owners" under CERCLA because they lacked the right to exclude under the common law); *United States v. Friedland*, 152 F.Supp.2d 1234, 1247 (D.Colo. 2001) (same).

Third, the Commission's ability to sell the property is heavily constrained. Article X, Section 3 of the California Constitution prohibits the State from selling to private parties any tidelands located within two miles of any town or city fronting navigable waters. Cal. Const. art. 10, § 3. For purposes of this provision, the term "tidelands" includes submerged lands. *San Pedro, L.A. & S.L.R Co. v. Hamilton*, 161 Cal. 610, 613-614 (1912). Considering the Commission's property interests are located within two miles of the City of San Francisco (Lehman Decl. ¶ 7), this Constitutional prohibition prevents the Commission from selling any of its property interests to private parties within the Site.

The Commission's ability to sell is also constrained by the nature of the public trust. The Commission can only sell its interest in tidelands or submerged lands free of the public trust in "rare cases," none of which are present here. *Nat'l Audubon Soc'y v. Superior Court*, 33 Cal.3d 419, 441 (1983); *City of Long Beach v. Mansell*, 3 Cal.3d 462, 482 (1970) (declaring the legislature can remove the trust upon a finding that the land is no longer useful for trust purposes). As a result, the Commission cannot transfer clear title to any purchaser because the purchaser could not exclude the public from the property. *See City of Berkeley v. Superior Court*, 26 Cal.3d 515 (1980) (finding purchasers of tidelands and submerged lands from the State acquired those lands subject to the public trust, and the public had rights of access to those lands); *People of Cal. Fish Co.*, 166 Cal. 576 (1913) (title of purchasers of tidelands was subject to the public trust).

These restrictions on the Commission's ability to sell the land demonstrate that the Commission is not an owner under the common law and CERCLA. *See City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 451 (9th Cir. 2011) (finding that a holder of a revocable permit was not an "owner" under CERCLA because the unrestricted ability to convey the permit was one of the "core attributes of ownership [which] were absent in the [permit holder's] bundle of rights.").

Fourth, the federal government can take the property at any time under the federal navigational servitude. The federal Submerged Lands Act, 43 U.S.C. § 1301 *et seq.*, expressly provides that the interest of the states in submerged lands and tidelands is subject to the United

State's navigational servitude, which is "paramount" to the interest of the states. 43 U.S.C. § 1314(a) (defining federal interest), § 1311 (defining interest of the states), § 1301(a) (defining property covered by the statute).

The federal navigational servitude arises from the Commerce Clause and the public trust doctrine, and it "generally relieves the [federal] government of the obligation to pay compensation for acts interfering with the ownership of riparian, littoral, or submerged lands which, if not for the fact that a waterway is involved, would require compensation under the fifth amendment." *Boone v. United States*, 944 F.2d 1489, 1494-1495 (9th Cir. 1991). *See Murphy v. Dept. of Nat. Res.*, 837 F.Supp. 1217, 1221 (S.D. Fla. 1993) ("Under the doctrine of navigational servitude, the Federal Government may erect structures or otherwise modify a navigable stream without offering financial compensation to the State or to the owners of the submerged land.").

It is difficult to conceive of the Commission as the "owner" of property which can be taken by the United States without compensation, thereby unilaterally extinguishing the State's interest in the property.

The Supreme Court has recognized the substantial effect of the federal navigational servitude on the interest of the holder of title to submerged lands:

> "[W]hether the title to the submerged lands of navigable waters is in the state or in the riparian owners, it was acquired subject to the rights which the public have in the navigation of such waters. The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. **It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation**."

Scranton v. Wheeler, 179 U.S. 141, 163 (1900) (emphasis added). Thus, any title to submerged lands is at most a "bare technical title," and the federal navigational servitude allows the federal government to take such property at any time without compensation. Of course, bare legal title is not sufficient to qualify one as an "owner" under CERCLA. *See In re Bergsoe Metal Corp.*, 910 F.2d 668, 673 (9th Cir. 1990) (lessor in sale-leaseback transaction held title to property, but it was not the "owner" for purposes of CERCLA); *Castlerock Estates, Inc. v. Estate of Markham*, 871 F.Supp. 360, 366 (N.D. Cal. 1994) ("The court finds that bare legal title is not enough in determining whether a fiduciary should be held liable as an owner under CERCLA."); *United*

States v. Friedland, 152 F.Supp.2d 1234, 1241-46 (D.Colo. 2001) (holding legal title was not enough to show owner liability under CERCLA).

III. The Sovereign Status of the Property Has Not Been Changed By Any Filling and Reclaiming of the Property or Transfers to The City and Port of San Francisco and The California Department of Parks and Recreation.

Some of the land within the Site to which the Commission holds title is submerged lands and tidelands which have been filled or reclaimed in the years since the State's admission to the Union in 1850. [Lehman Decl. ¶¶ 5-6.] Nevertheless, any filling and reclaiming has not altered the nature of the property as state sovereign land subject to the public trust. *City of Long Beach v. Mansell*, 3 Cal.3d 462, 479, 486-87 (1970); *Zack's, Inc. v. City of Sausalito*, 165 Cal.App.4th 1163, 1177 (2008) ("the public trust continues to apply to tidelands even if . . . the lands are no longer submerged due to the placement of fill."); *City of Alameda v. Todd Shipyards Corp.*, 632 F.Supp. 333, 340 (1986) ("The California courts have expressly held that filling the land alone does not ease the trust restrictions."); 43 U.S.C. § 1301(a)(3) (filled and reclaimed lands, which were formerly lands beneath navigable waters, are subject to the federal navigational servitude).

Likewise, transfers involving the City and County of San Francisco and the California Department of Parks and Recreation ("Parks") have not changed the sovereign status of the property. The submerged lands and tidelands to which the Commission has held title within the Site were granted to the City and County of San Francisco under the Burton Act in 1968. That land was returned to the Commission by a quitclaim deed in 1983, and the Commission currently leases this land to the California Department of Parks and Recreation. [Lehman Decl. ¶ 6.]

Throughout these conveyances, the land has never lost its sovereign character and the public trust has never been removed. For instance, the introductory language in the Burton Act declares that it authorizes "the transfer in trust" to the City, and Section 18 of the Act reserves the Legislature's right to "amend, modify or revoke" the transfer of any of the lands. 1968 Cal. Stat. Ch. 1333, pp. 2544, 2550. The recording of the 1983 quitclaim deed also includes a Certificate of Acceptance, which declares the State accepts the property "in its sovereign capacity in trust for the people thereof as real property of the legal character of tide and submerged lands." *See also* Cal. Pub. Res. Code § 6009 (c) ("Tidelands and submerged lands granted by the Legislature to local entities remain subject to the public trust, and remain subject to the oversight authority of the state by and through the State Lands Commission."); *City of Long Beach v. Morse*, 31 Cal.2d 254, 257 (1947) (finding that a municipal grantee of public trust property " 'assumes the same burdens and is subject to the same regulations that appertain to other trustees of such trusts.' ").

In 2011, the Commission approved the "Hunters Point Shipyard/Candlestick Point Title Settlement, Public Trust Exchange and Boundary Line Agreement" (the "Agreement"), which comprised agreements, land exchanges, and lease changes involving the Commission, the City and County of San Francisco, the Port of San Francisco, and Parks, in order to resolve title and boundary disputes within the vicinity of the Site and elsewhere. None of the contemplated land exchanges involving the Commission under the Agreement within the vicinity of the Site have

occurred. Under the Agreement, the Commission will retain a band of state sovereign land along shoreline within the perimeter of Candlestick State Recreation Area that will be leased to Parks. This band of state sovereign land is depicted in Exhibit C attached to Mr. Lehman's declaration. [Lehman Decl. ¶ 8.]

IV. The One Federal Court to Rule on the Issue Found that Holding Title to State Sovereign Land is not "Ownership" Under the Common Law and CERCLA.

We are aware of only one judicial decision which has addressed whether holding title to state sovereign land is "ownership" for purposes of CERCLA liability. In *United States v. Montrose Chem. Corp.*, CV 90-3122 AAH (C.D. Cal. Oct. 19, 1999), the United States and the State of California brought a CERCLA action to recover natural resource damages for harm to the Palos Verdes Shelf (the "PV Shelf"). *See State of Cal. v. Montrose Chem. Corp.*, 104 F.3d 1507, 1511 (9th Cir. 1997). The PV Shelf comprises submerged lands located off of the Palos Verdes Peninsula near Los Angeles and which are part of the "marginal belt," *i.e.* the area three miles seaward of the line of mean low tide. *See* www.epa.gov/region09/pvshelf/. During the course of the litigation, the private entity defendants filed counterclaims for cost recovery and contribution against the State, and they moved for summary judgment on the ground that the State was liable under CERCLA as an "owner" of the PV Shelf. In denying defendants' motion, the court held that the State was not an "owner" of the PV Shelf for purposes of CERCLA. The court declared:

> "10. The Ninth Circuit has stated, 'we deem a defendant's status as an owner under common law as necessary to being an owner under CERCLA . . . .'
>
> ....
>
> 12. The Defendants have failed to show that under CERCLA the State of California is the current 'owner' of the Palos Verdes Shelf. Pursuant to the Submerged Lands Act, all coastal states were granted title to the lands under the ocean for a distance of three miles from the coastline. **However, the title granted to the State is not 'ownership' under CERCLA.**
>
> ....
>
> 14. The interest of the State in submerged lands is unique; it is more an attribute of sovereignty than a traditional property interest.
>
> 15. The State's interest in the Palos Verdes Shelf is sovereign title, a unique interest which lacks the essential elements of common law title. The State does not possess the right to exclude others, an essential attribute of ownership; the State cannot sell the property except in extremely rare instances; and the State's rights

> can be taken by the federal government at any time without compensation.
>
> ....
>
> 19. The Court finds and concludes that the State of California is not the 'owner' of the Palos Verdes Shelf for the purposes of CERCLA."

United States v. Montrose Chem. Corp., CV 90-3122 AAH (C.D. Cal. Oct. 19, 1999) at p. 4 (citations omitted) (emphasis added). A copy of this decision is provided with this letter.

Like the State of California in *United States v. Montrose Chem. Corp.*, the Commission's title to property within the Site is sovereign title and lacks the common law right to exclude. The Commission can only sell its interest in very rare instances, and its rights can be taken by the federal government at any time without compensation pursuant to the federal navigational servitude. Thus, just like the State in *United States v. Montrose Chem. Corp.*, the Commission is not an "owner" of any property within the Site under CERCLA.

V. Conclusion: The Commission Should Not Be Considered a PRP.

For all of the above reasons, the Commission does not have liability as an "owner" under CERCLA at the Site. Accordingly, the Commission respectfully requests the EPA not to consider the Commission as a PRP.

We appreciate your consideration of the information and materials which we have provided, and we look forward to your response. Please feel free to contact us if you have any questions.

Sincerely,

DAVID G. ALDERSON
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

DGA:
OK2012306996
90295408.doc

DECLARATION OF STEVE C. LEHMAN

I, Steve C. Lehman, declare:

1. I am a duly Licensed Land Surveyor in the State of California (LS 7377). I have personal knowledge of each fact stated in this declaration.

2. I have been engaged in the practice of surveying for approximately 43 years. I am employed as a Licensed Land Surveyor/Senior Boundary Determination Officer at the California State Lands Commission (the "Commission") and have been employed as a surveyor by the Commission since 1999.

3. I was requested by counsel at the Commission and the California Attorney General's Office to determine the Commission's present and historical property interests within the Yosemite Slough Site (the "Site") in San Francisco, California, as depicted in the area on the map attached as Exhibit A, which was included in the April 5, 2013 General Notice Letter from the United States Environmental Protection Agency to Jennifer Lucchesi, Executive Officer of the Commission.

4. After receiving the request by counsel, I examined pertinent records in possession of the Commission related to its present and historical property interests within the boundary of the Site.

5. As a result of my examination, it is my professional opinion that, within the boundary of the Site, the Commission currently holds and historically has only ever held title to land which the State of California assumed from the federal government when it became a state in 1850. This sovereign land consists of submerged land and tidelands, and submerged land and tidelands that have been filled or reclaimed in the time since the State's admission to the Union. Since the State's admission to the Union, the land the Commission currently holds title to within the boundary of the Site has always been subject to the public trust and has never lost its sovereign status. Of the land the Commission previously held title to within the boundary of the Site, at the time the Commission held title to those lands, those lands had always been subject to the public trust and had never lost their sovereign status. Other than holding title to land which the State of

California assumed from the federal government when it became a state in 1850, the Commission does not and has never had any other property interests within the boundary of the Site.

6. Attached to this declaration as Exhibit B is a map I prepared that includes the boundary of the Site (as depicted in Exhibit A) and information about the property within the Site. The submerged lands and tidelands to which the Commission currently holds title within the Site are marked with teal lines in the northeast portion of the Site. These lands are sovereign lands (*i.e.* lands that the State assumed from the federal government in 1850) that the State granted in trust to the City and County of San Francisco under the Burton Act in 1968. They were returned to the Commission by a quitclaim deed in 1983 (recorded January 24, 1984 in the Recorder's Office of City and County of San Francisco), and the Commission currently leases this land to the California Department of Parks and Recreation ("Parks"). The majority of the tide and submerged lands within the Site, specifically the water covered lands below the mean high tide line, are also sovereign lands that the State granted in trust to the City and County of San Francisco under the Burton Act in 1968, and they remain granted in trust to the City and County of San Francisco. These lands are marked with pink dots on Exhibit B. A portion of the water covered land within the Site on the southeast side was sovereign land that was conveyed to private ownership by the Board of Tideland Commissioners in 1870. These lands are marked with black squares on Exhibit B. Finally, a small portion of the water covered land within the Site on the western edge was never sovereign land of the State, and the Commission has never had an interest in this property.

7. I was asked by counsel to determine whether the Commission's property interests within the Site are located within two miles of the City of San Francisco. As a result of my examination, it is my professional opinion that the Commission's property interests within the Site are located within two miles of the City of San Francisco.

8. In 2011, the Commission approved the "Hunters Point Shipyard/Candlestick Point Title Settlement, Public Trust Exchange and Boundary Line Agreement" (the "Agreement"), which comprised agreements, land exchanges, and lease changes involving the Commission, the City and County of San Francisco, the Port of San Francisco, and Parks, in order to resolve title

and boundary disputes within the vicinity of the Site and elsewhere. Based upon my review of the Commission's records, none of the contemplated land exchanges involving the Commission under the Agreement have occurred. Under this Agreement, the Commission will retain a band of state sovereign land along shoreline within the perimeter of Candlestick State Recreation Area that will be leased to Parks. This band of state sovereign land is depicted in Exhibit C attached to this declaration.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: 5/23/13

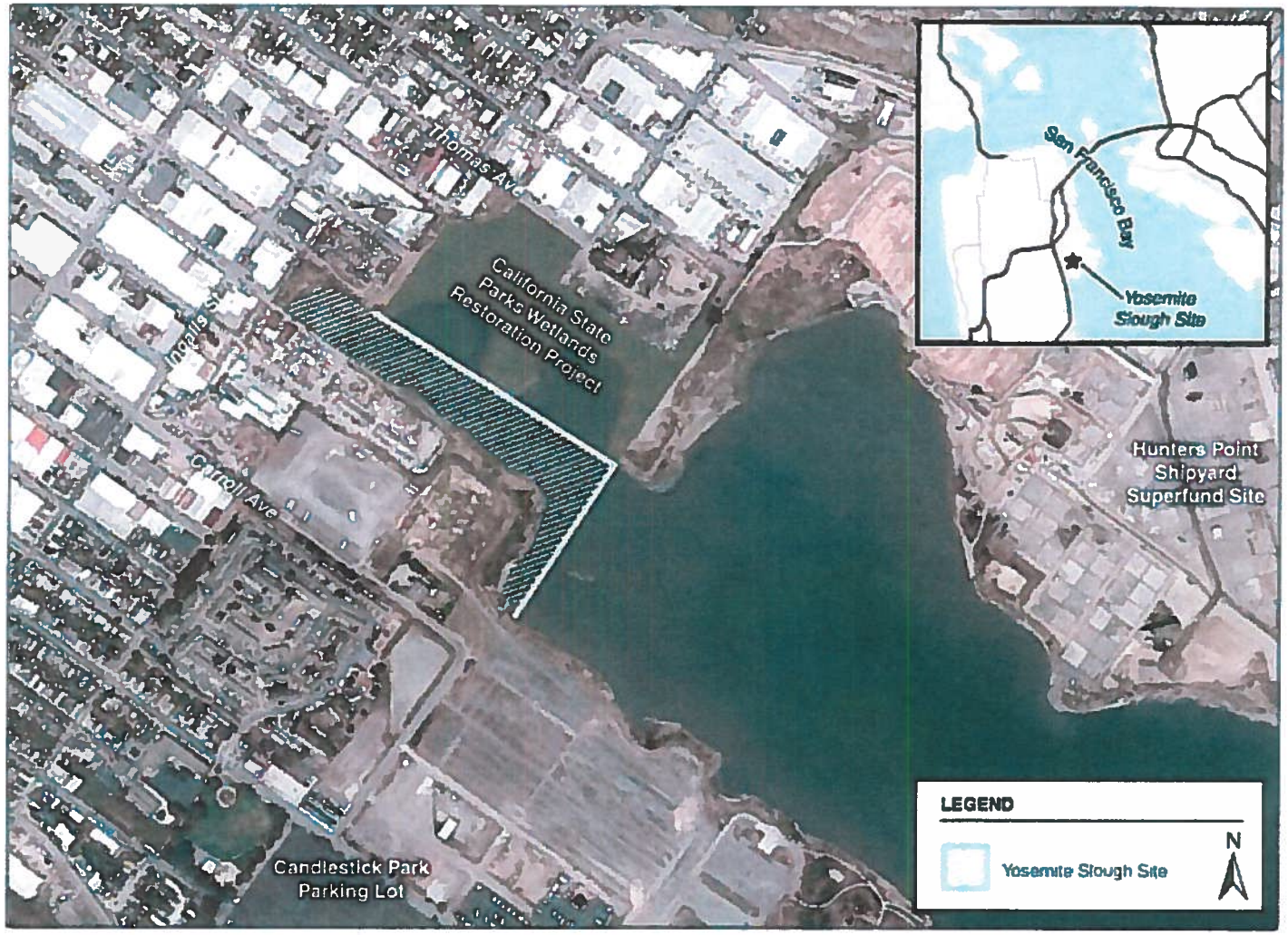
Steve C. Lehman

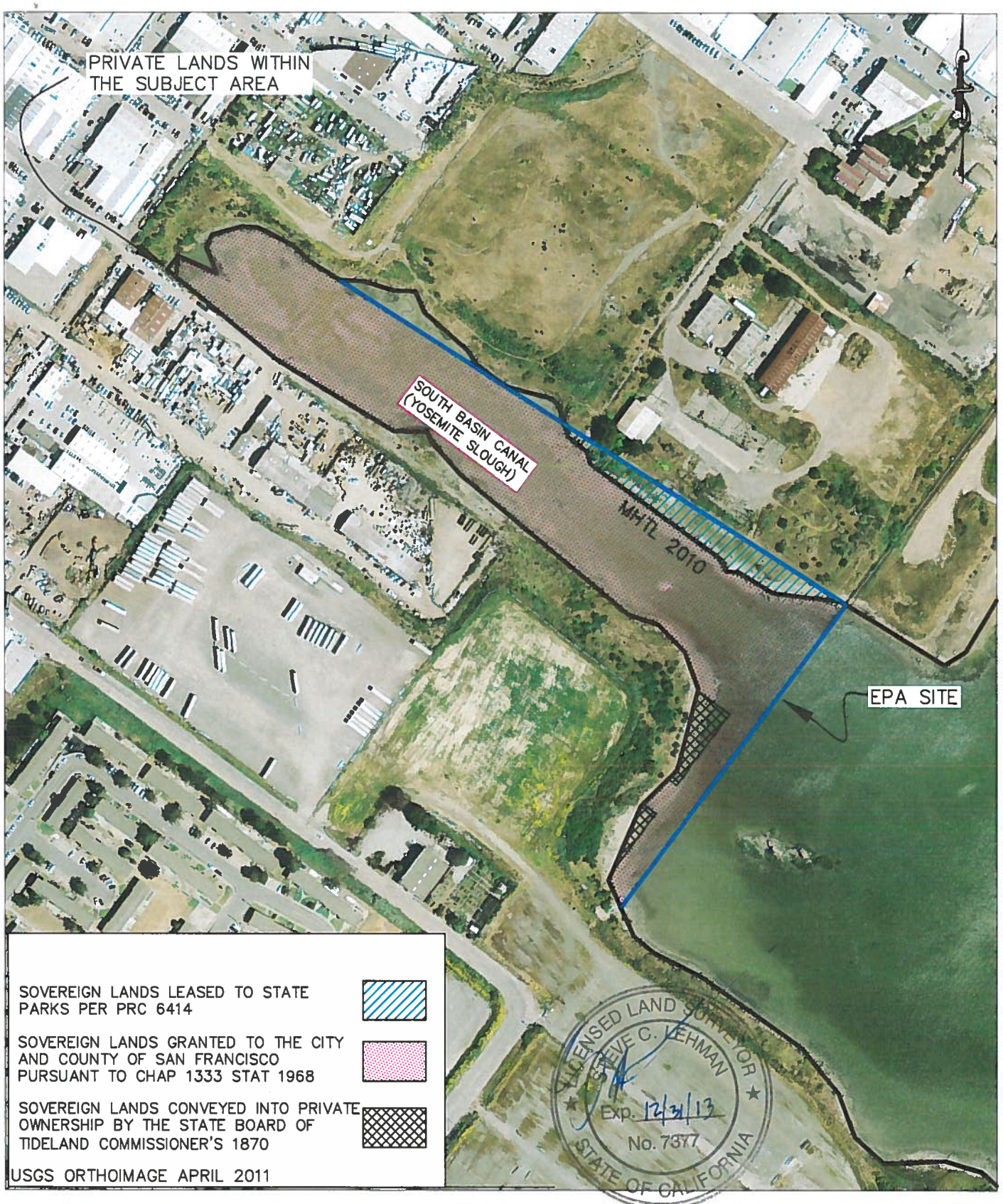
LICENSED LAND SURVEYOR
STEVE C. LEHMAN
Exp. 12/31/13
No. 7377
STATE OF CALIFORNIA

OK2012306996
11092057.doc

EXHIBIT A

Enclosure 1: Approximate Yosemite Slough Site Boundary Area





PLAT NOT TO SCALE

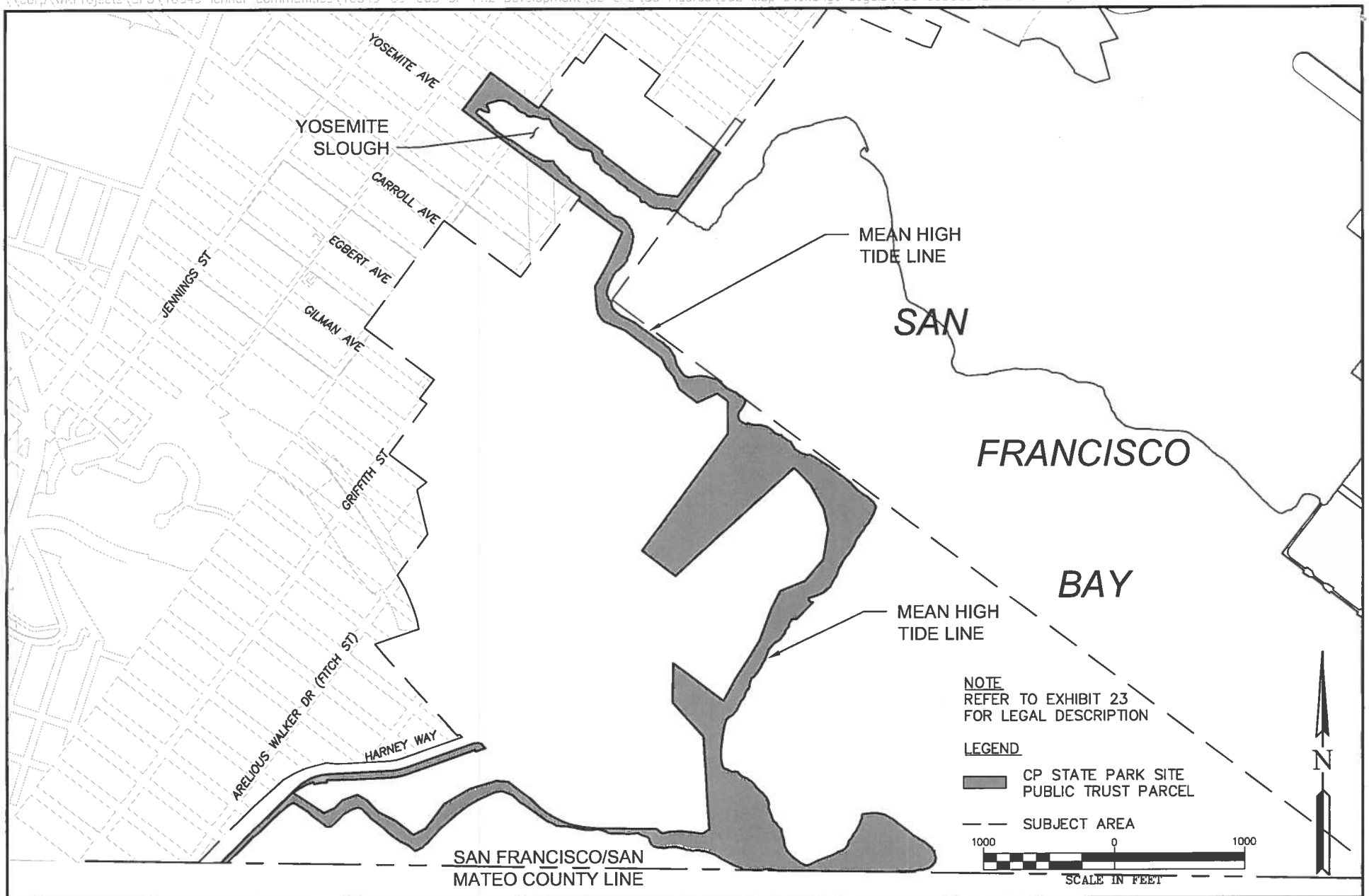
EXHIBIT B

SCL 5-13-13

U.S. ENVIRONMENTAL PROTECTION AGENCY
YOSEMITE SLOUGH SITE
SAN FRANCISCO CALIFORNIA

CALIFORNIA STATE LANDS COMMISSION

EXHIBIT C



WINZLER & KELLY
417 Montgomery Street, Suite 700 San Francisco, CA 94104
tel (415) 283-4970 ♦ fax (415) 283-4980 ♦ www.w-and-k.com

DRAWN BY: JMS | FILE NO:

REVISION DATE: 30 MAR 2011 | SCALE: AS SHOWN

HPS CP TITLE SETTLEMENT, PUBLIC TRUST EXCHANGE, AND BOUNDARY LINE AGREEMENT

ILLUSTRATIVE PLAT OF CP STATE PARK SITE PUBLIC TRUST PARCEL

EXHIBIT 7

1 OF 1